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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 VERSANT FUNDING, LLC,

7 Plaintiff,

8 v.

9 TERAS BREAKBULK OCEAN
NAVIGATION ENTERPRISES, LLC,
et al.,

10 Defendants.

CASE NO. C17-5282 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS OR TRANSFER AND
TRANSFERRING CASE

11 This matter comes before the Court on Sonny Joe Sanders ("Sanders"), Teras
12 Breakbulk Ocean Navigation Enterprises, LLC ("Teras Ocean"), Teras Cargo Transport
13 (America), LLC ("Teras Cargo"), and Teras Chartering, LLC's ("Teras Chartering")
14 (collectively "Defendants") motion to dismiss or, in the alternative, to transfer under 28
15 U.S.C. § 1404(a) (Dkt. 18). The Court has considered the pleadings filed in support of
16 and in opposition to the motion and the remainder of the file and hereby grants the
17 motion in part and denies it in part for the reasons stated herein.
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19 **I. PROCEDURAL HISTORY**

20 On April 14, 2017, Versant filed a complaint against Defendants asserting causes
21 of action for breach of contract, breach of performance guarantees, and fraud. Dkt. 1.
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1 On May 27, 2017, Defendants moved to dismiss or, in the alternative, transfer,
2 arguing that the contract at issue contained mandatory forum-selection clauses requiring
3 the dispute to be heard in Florida. Dkt. 15.

4 On June 14, 2017, Versant filed an amended complaint adding another breach of
5 contract claim and requesting the appointment of a receiver. Dkt. 16 (“FAC”).

6 On June 26, 2017, Defendants moved to dismiss or, in the alternative, to transfer.
7 Dkt. 18. On July 14, 2017, Versant moved for an extension of time to respond and file a
8 cross motion. Dkt. 20. On July 17, 2017, Defendants responded to Versant’s motion.
9 Dkt. 22. On July 18, Defendants filed a reply to its motion to dismiss, arguing that the
10 Court should grant the motion because Versant failed to respond. Dkt. 24. On July 21,
11 2017, Versant filed a substantive response to Defendants’ motion. Dkt. 25. Later that
12 day, Defendants filed a reply and moved to strike Versant’s untimely response. Dkt. 29.¹

13 II. FACTUAL BACKGROUND

14 Versant is a Delaware company that provides factoring services to its clients.
15 FAC, ¶¶ 2, 18. Factoring is a type of credit arrangement where credit is extended to
16 companies under stricter than normal terms. *Id.* ¶ 17. On October 30, 2015, Versant and
17 Teras Cargo entered into a factoring agreement and a security agreement. *Id.*, Exh. E. In
18 the factoring agreement, Versant agreed to purchase some of Teras Cargo’s accounts
19 receivable in exchange for money in advance of payment on the particular account. *Id.*,

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21
22 ¹ The Court denies the motion to strike. While Versant’s response is untimely, Defendants suffer
no prejudice from the Court’s consideration of the brief.

1 Exh. E. The factoring agreement contained a forum selection clause that provides in
2 relevant part as follows:

3 The parties hereto mutually agree that any legal action relating to or arising
4 from the Factoring Agreement, the Security Agreement, the Account
5 Agreements or the Performance Guaranty (or Guaranties), if any, or
6 relating in any way to the factoring relationship between Versant and the
7 Seller and Guarantor(s), shall be maintained only in (a) state courts of Palm
8 Beach County, Florida, or (b) the United States District Court serving Palm
9 Beach County, Florida (except that Versant shall have the right to bring any
10 action or proceeding against Seller or its property in the courts of any other
11 jurisdiction that Versant deems necessary or appropriate, in Versant's sole
12 discretion, to realize upon the Accounts Receivable or any other collateral
13 of Seller subject to Versant's lien)

9 *Id.* ¶ 11.

10 In the security agreement, Versant obtained an interest in all property owned or
11 acquired by Teras Cargo. *Id.* This agreement does not contain a forum selection clause.

12 On November 20, 2015, Versant and Teras Ocean entered into the identical
13 factoring and security agreements. FAC, Exhs. A, B. Sanders also entered into
14 agreements personally guaranteeing the performance of Teras Cargo and Teras Ocean.
15 *Id.*, Exhs. C, G. The performance guarantees include the same forum selection clause.

16 On July 21, 2016, Versant and Teras Charting entered into the identical factoring
17 and security agreements. FAC, Exh. D. Sanders, as CEO of Teras Cargo, sent Versant a
18 letter confirming a cross collateralization of the "invoices, reserves, assets and/or funds"
19 of Teras Cargo with the same of Teras Chartering and Teras Ocean. *Id.*, Exh. F.

20 On August 29, 2016, Versant and Teras Ocean entered into a purchase and sale
21 agreement for an advance of \$1,050,000 in exchange for \$1,400,000 of accounts
22 receivable. *Id.*, Exh. H. Defendants used the advance to fund the transfer of cargo

1 | aboard the M/V Seattle from Kuwait to North Carolina. FAC, ¶ 29. If the cargo was
2 | delivered on time, the client would pay Teras Ocean \$1,400,000. *Id.* Versant alleges that
3 | the M/V Seattle broke down in route, the cargo was not delivered on time, and the client
4 | cancelled the contract, paying no portion of the fee. *Id.* ¶ 34.

5 | **III. DISCUSSION**

6 | “For the convenience of parties and witnesses, in the interest of justice, a district
7 | court may transfer any civil action to any other district or division where it might have
8 | been brought or to any district or division to which all parties have consented.” 28
9 | U.S.C. § 1404. “When the parties have agreed to a valid forum-selection clause, a district
10 | court should ordinarily transfer the case to the forum specified in that clause.” *Atl.*
11 | *Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581
12 | (2013). “Only under extraordinary circumstances unrelated to the convenience of the
13 | parties should a § 1404(a) motion be denied.” *Id.*

14 | In this case, the parties specified a forum in their agreements. The parties
15 | mutually agreed to litigate any dispute relating to or arising from the factoring, security,
16 | or performance agreements in Florida. *See, e.g.*, FAC, Exh. A, ¶ 11. The language is
17 | clear and should be enforced. Versant, however, argues that two exceptions exist to the
18 | forum selection clause.

19 | Before analyzing the exceptions, the Court must address Versant’s implicit
20 | assertion that Florida law governs the interpretation of the forum selection clause. In the
21 | Ninth Circuit, courts “apply federal law to the interpretation of the forum selection
22 | clause.” *Doe I v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (citing *Manetti–*

1 *Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir.1988)). This appears to be
2 the rule even if the contract in question contains a choice of law provision. *See, e.g., Doe*
3 *I v. AOL LLC*, CV–06–05866–SBA, (C.D. Ca.), Dkt. 16 at 12 (choice of law provision in
4 contract that was not enforced by district court or Ninth Circuit when interpreting forum
5 selection clause). In any event, the Court is unaware of, and Versant has failed to cite,
6 any authority for the proposition that the Court should apply Florida law when
7 interpreting the forum selection clause. Therefore, the Court will apply federal law.

8 When we interpret a contract under federal law, we look for guidance “to general
9 principles for interpreting contracts.” *Klamath Water Users Protective Ass’n v.*
10 *Patterson*, 204 F.3d 1206, 1210 (9th Cir.1999). “Contract terms are to be given their
11 ordinary meaning, and when the terms of a contract are clear, the intent of the parties
12 must be ascertained from the contract itself. Whenever possible, the plain language of the
13 contract should be considered first.” *Id.* (internal citation omitted). With these general
14 principles in mind, the Court turns to Versant’s arguments.

15 First, Versant argues that the “Receivership Provision governs the venue issue . . .
16 .” Dkt. 25 at 10. While this provision may govern Versant’s claim to appoint a receiver,
17 Versant provides no authority or reasonable argument for the proposition that it may file
18 all claims against Defendants in any district where it may file a request for a receiver. If
19 this were true, the exception would literally swallow the agreed-upon forum selection
20 rule. It is a more reasonable interpretation of the contract provisions that if Defendants
21 are in default or Versant obtains a judgment for breach of contract, then Versant may file
22 a complaint for a receiver in any court of competent jurisdiction to secure property in that

1 jurisdiction. The contract claims, however, must be litigated in Florida. Then, if
2 successful, Versant may execute upon its judgment anywhere Defendants' property may
3 reside. Therefore, the Court concludes that the receivership provision does not trump the
4 forum selection clause.

5 Second, Versant argues that the forum selection clause includes a “‘carve out’
6 which limits its scope.” Dkt. 25 at 13. This exception is stated as follows:

7 except that Versant shall have the right to bring any action or proceeding
8 against Seller or its property in the courts of any other jurisdiction that
9 Versant deems necessary or appropriate, in Versant's sole discretion, to
realize upon the Accounts Receivable or any other collateral of Seller
subject to Versant's lien.

10 FAC, Exh. A, ¶ 11. Defendants argue that Versant did not invoke this clause and the
11 clause is limited to post-judgment actions. Dkt. 18 at 10. The Court agrees on both
12 points. None of Versant's claims seek “to realize upon the Accounts Receivable or any
13 other collateral” of Defendants. Instead, Versant seeks judgment on breach of contract
14 and fraud claims while a receiver is appointed to protect Defendants' assets until it
15 obtains that judgment. As such, the “carve out” is reasonably interpreted to be a post-
16 judgment exception to enforce that judgment wherever Defendants' collateral may be
17 located. Therefore, the Court concludes that the “carve out” provision does not apply to
18 Versant's claims.

19 In summary, the Court concludes that the forum selection clause should be
20 enforced. Based on this conclusion, the Court grants Defendants' motion to transfer
21 Versant's contract and fraud claims to the United States District Court for the Southern
22 District of Florida, which is the federal court serving Palm Beach County, Florida.

1 Regarding the claim to appoint a receiver, it seems impracticable to evaluate this claim in
2 this Court while the other claims proceed in Florida. Such a separation of claims would
3 unnecessarily consume both the parties' and judicial resources. Moreover, the
4 appointment of a receiver depends upon the merit of Versant's claims, which means one
5 court should evaluate these interrelated issues. Thus, the Court concludes that Versant's
6 receivership claim should be transferred in the "interests of justice." *See, e.g., Hawkins v.*
7 *Gerber Products Co.*, 924 F. Supp. 2d 1208, 1217 (S.D. Cal. 2013) ("transfer of this
8 action would promote efficiency and fairness to the litigants.").

9 IV. ORDER

10 Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss or, in the
11 alternative, to transfer under 28 U.S.C. § 1404(a) (Dkt. 18) is **GRANTED in part** and
12 **DENIED in part** as stated herein.

13 The Clerk is directed to transfer this matter to the United States District Court for
14 the Southern District of Florida and close this case.

15 Dated this 21st day of September, 2017.

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18 BENJAMIN H. SETTLE
19 United States District Judge
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